

## 1 UNITED STATES BANKRUPTCY COURT

2 DISTRICT OF NEVADA

3 LAS VEGAS, NEVADA

4 In re: USA COMMERCIAL MORTGAGE ) AUGUST 4, 2006  
5 COMPANY, ) E-Filed: 09/04/06  
6 Debtor. ) Case No.  
7 ) BK-S-06-10725-LBR  
8 ) Chapter 11

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8 PARTIAL TRANSCRIPT OF PROCEEDINGS  
9 OF  
10 JUDGE'S RULING  
11 ON

12 MOTION TO TEMPORARILY HOLD FUNDS  
13 PENDING A DETERMINATION OF THE PROPER RECIPIENTS,  
14 AND MEMORANDUM OF POINTS AND AUTHORITIES, NO. 173  
15 AND

16 MOTION FOR RELIEF FROM STAY, NO. 208  
17 AND

18 MOTION TO COMPEL DEBTOR TO CONTINUE  
19 TO FORWARD LENDER PAYMENTS TO DIRECT LENDERS,  
20 AND MOTION TO DELAY OR PROHIBIT APPRAISALS  
21 ON PERFORMING LOANS, NO. 215

22 AND  
23 APPLICATION TO EMPLOY SIERRA CONSULTING GROUP, LLC,  
24 AS FINANCIAL ADVISORS

25 TO THE OFFICIAL UNSECURED CREDITORS COMMITTEE  
FOR USA COMMERCIAL MORTGAGE COMPANY  
PURSUANT TO FEDERAL RULE OF BANKRUPTCY PROCEDURE 2014(A)  
FOR ORDER UNDER SECTION 1103 OF THE BANKRUPTCY CODE, NO. 878  
AND

19 MOTION DIRECTING PAYMENTS TO DIRECT LENDERS, NO. 336  
20 AND

21 MOTION TO USE CASH COLLATERAL THROUGH JULY 29, 2006,  
22 PURSUANT TO SECOND REVISED BUDGET, NO. 407

23 AND  
24 APPLICATION FOR ADMINISTRATIVE ORDER  
25 ESTABLISHING PROCEDURES FOR INTERIM COMPENSATION  
AND REIMBURSEMENT OF EXPENSES OF PROFESSIONALS, NO. 570  
AND

24 Court Recorder: Helen C. Smith

25 Proceedings recorded by electronic sound recording;  
transcript prepared by transcription service.

1 MOTION FOR ORDER APPROVING CONTINUED USE OF CASH  
2 THROUGH OCTOBER 29, 2006,  
3 PURSUANT TO THIRD REVISED BUDGET, NO. 846  
4 AND  
5 MOTION TO DISTRIBUTE FUNDS  
6 AND TO GRANT ORDINARY-COURSE RELEASES  
7 AND DISTRIBUTE PROCEEDS, NO. 847  
8 AND  
9 MOTION FOR RELIEF FROM STAY, NO. 863  
10 VOLUME 1  
11 BEFORE THE HONORABLE LINDA B. RIEGLE  
12 UNITED STATES BANKRUPTCY JUDGE  
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Friday, August 4, 2006

9:30 a.m.

25 Proceedings recorded by electronic sound recording;  
transcript produced by transcription service.

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1 (Court previously convened at 09:39:35 a.m.)

2 (Partial transcript of Judge's ruling at 12:14:30 p.m.)

3 THE COURT: Thank you.

4 I'm going to grant the motion with one minor change,  
5 and I'll explain my reasoning for all of this. With respect  
6 to the loans that are paid off, I'd authorize the debtor to  
7 hold back an additional two percent while you investigate  
8 whether or not you were entitled to more.

9 It seems to be on the loans that are paid off you  
10 aren't going to -- you'll have a harder time. You may have  
11 a harder time doing adjustments later if it turns out that  
12 the estate was entitled to that. Again, it's to be held,  
13 not to be spent, but held pending that determination.

14 I won't require the same thing vis-a-vis the ongoing  
15 payments on the loan because those adjustments could be made  
16 later.

17 Now, let me go through my analysis here, and let me  
18 make some things clear. Not everybody who invested money  
19 either as a direct lender or with one of the funds is going  
20 to receive a check, and that's because we can only  
21 distribute those moneys that came in on account of loans  
22 that are now paying.

23 Now, the reason that the one fund will get money is  
24 because they have a loan which is -- they have loaner loans  
25 which are performing, and that's the basis, and then under

1 their agreements that goes out to the members.

2 The other fund has no performing loans at this stage,  
3 and so, therefore, there is no funds available to go to  
4 their investors. As much as we would all like to change  
5 that reality, we can't at this stage or, perhaps, ever.

6 Now, let's go through the analysis as to why these  
7 moneys should be distributed as opposed to waiting. First  
8 of all, at least, it appears as if at this stage that people  
9 had direct interest in loans and were actual beneficiaries  
10 on loans and deeds of trust secured by deeds of trust which  
11 were governed by a servicing agreement.

12 Hence, under the servicing agreement to the extent the  
13 money came in, they're entitled to be paid those funds out  
14 absent a servicing fee. So absent bankruptcy, that's what  
15 would happen.

16 Now, are there questions about whether or not those  
17 funds shouldn't be turned over? Yes. There are legitimate  
18 questions.

19 There are legitimate questions which may arise as to is  
20 it truly the lender's money or did it become the estate  
21 money because of commingling and all those other legal  
22 issues or are there other equitable legal reasons for which,  
23 ultimately, these cases all of the money should be put in a  
24 pot and shared?

25 But at this stage, it appears as if there is no basis

1 for putting the money in an entire pot and sharing it. Each  
2 person has their rights under loans and deed of trust;  
3 hence, the money should be distributed.

4 Now, what, though, about the rights to net? I think  
5 it's appropriate at this stage to net without making a final  
6 legal determination. Under the doctrine, I believe  
7 recoupment is applicable.

8 I understand recoupment applies to a single  
9 transaction, but here notwithstanding the fact there may  
10 have been four -- an individual may have had several loans  
11 the point was they got one statement, the money was in one  
12 account, and everybody sort of treated it as sort of this  
13 flowing thing.

14 So I think the Doctrine of Recoupment at least as a  
15 preliminary stage if I were to view this much like a  
16 preliminary injunction weighing the evidence would allow for  
17 the Doctrine of Netting, and, again, the money's being held  
18 back. It's not being applied.

19 The next issue is that Mr. Levinson argues that you  
20 shouldn't distribute these moneys. Well, he claims he said  
21 you shouldn't distribute it, but he really is hedging.

22 He doesn't want to be the subject of being running out  
23 of town on a rail. He says that it should be limited to  
24 distribution.

25 And even though I've given him a hard time, he's doing



1 a good job representing his clients who like everybody else  
2 was defrauded in this scheme, and his people are left with  
3 nothing.

4 But as much as we would all like to see the I guess  
5 arguably inequitable concept, the concepts that he argues it  
6 seems to me are concepts which require attachment,  
7 et cetera, in an adversary proceeding. It's unlike  
8 recoupment.

9 And I apologize for those of you who are not attorneys  
10 with these legal doctrines what's very important because as  
11 much as again we would all like to see everybody get  
12 something, perhaps, from one standpoint the point is as some  
13 others argued it's my money, I'm entitled to it, and there's  
14 no legal basis for it, and so we have to apply the legal and  
15 factual basis.

16 So weighing those two things, I think it's appropriate  
17 to distribute the funds, but it's also appropriate to net at  
18 least until we can get a little better sense of what we're  
19 ultimately going to have to do.

20 Netting makes a lot more sense, too, again as between  
21 the direct lenders. Now, we're not talking about the  
22 relationships between the funds and Commercial Mortgage.

23 We're talking about as between the direct lenders.  
24 Netting makes much more sense because, otherwise, the  
25 argument is that you'd have to sue.

1 That is an incredibly-expensive, frustrating, and  
2 unnecessary I think legal position. I'm not making a final  
3 determination, but you can certainly guess which my thinking  
4 is on that.

5 I've explained why I think it's appropriate to hold  
6 additional moneys off for servicing because under the  
7 contract the debtor was entitled to servicing fees, and I  
8 think it's better to hold back what you're entitled to and  
9 especially on the paid-off loans.

10 And, again, on the loans that payments are still going,  
11 there's enough room for a setoff later if it turns out the  
12 estate is entitled to those fees.

13 And, quite frankly, as much as we talk about we need to  
14 get the moneys to the lenders, the professionals in this  
15 case have worked very hard, and, unfortunately, they can't  
16 do it for free.

17 And in order to keep this whole thing going and to get  
18 back what we've got, we've had to have the professionals, so  
19 the servicing fees are moneys that the investors were never  
20 entitled to.

21 The servicing fees you agreed in the beginning that USA  
22 Commercial would get X percent, and that was the agreement,  
23 and that's all we're enforcing is that USA Commercial will  
24 get the amount to which they were entitled to be paid under  
25 the servicing agreement, and it's better to sort that out

1 later.

2 As to Mr. Landis' argument, to the extent that this  
3 is -- I think this is appropriate to make these interim  
4 distributions because at this stage it does not appear to be  
5 property of the estate, and, therefore, no plan is required.

6 (Court concluded at 12:21:50 p.m.)

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1 I certify that the foregoing is a correct transcript  
2 from the electronic sound recording of the proceedings in  
3 the above-entitled matter.

4  
5  
6 /s/ Lisa L. Cline

09/04/06

7 Lisa L. Cline, Transcriptionist

Date